

**IN THE ARMED FORCES TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**TA/ 426/10  
(Writ Petition (C) No.44/08)**

**EX SIGNALMAN RAJESH KUMAR  
R/O. VILLAGE & POST AURANGABAD  
THAHARPUR, BULANDSHAHR (U.P.)**

**THROUGH : MAJOR K. RAMESH, ADVOCATE**

**...PETITIONER**

**VERSUS**

- 1. UNION OF INDIA  
THROUGH SECRETARY  
MINISTRY OF DEFENCE  
NEW DELHI-110 011.**
- 2. CHIEF OF ARMY STAFF  
THROUGH ADJUTANT GENERAL (ADG DV 3)  
ARMY HEADQUARTERS  
NEW DELHI-110 011.**
- 3. THE COMMANDANT  
ARMY HQ CAMP  
NEW DELHI-110 010.**

**THROUGH : CAPTAIN GOURAV VERMA**

**...RESPONDENTS**

**CORAM :**

**HON'BLE SH. S.S.KULSHRESTHA, MEMBER  
HON'BLE SH. M.L.NAIDU, MEMBER**

**J U D G M E N T  
DATE : 05.02.2010**

1. This petition has been brought against the finding and sentence of the Summary Court Martial (SCM) whereby holding the petitioner to be guilty for the offence under section 379 IPC Read with Section 52(a) of Army Act and awarding the sentence of six months RI and as a result of which dismissal from service. It is said that the SCM without any evidence on record, merely on conjectures and surmises held the petitioner guilty for the aforesaid offence. Even while recording the plea of guilt on the part of the petitioner care was not taken of the provision under Rule 115(2). It is highlighted that the petitioner assisted in the recovery of his vehicle as was suspecting Signalman Driver/MT Ashok Kumar because of his past conduct for verifying about the vehicle. Arrest of Ashok Kumar was affected by the Police during the investigation but merely on his so called confessional statement before the police he was held guilty. The SCM had also not cared to take any other evidence. Further it has been submitted that the plea of guilt alone is not sufficient unless there is any evidence to substantiate the evidence against the petitioner.

2. This appeal has been resisted by Union of India that there was plea of guilt on the part of the appellant and further the accomplice

Driver/MT Ashok Kumar himself gave inculpatory statement and that statement is sufficient to fix culpability on the part of the petitioner. Moreover the plea of guilt on the part of petitioner would also substantiate the prosecution case.

3. In order to appreciate the points raised by the parties it shall be useful to make a brief resume of the facts. On 25.10.1997, the petitioner was attached to Army Headquarter Camp, Delhi Cantt. and was performing the duties as a Sahayak to Lt. Col. Avtar Singh Aujla. Lt. Col. Avtar Singh Aujla was having Maruti Car (800 cc) bearing registration no.PB 08L 7544. The petitioner proceeded on leave on 26.11.1997 and had also given his contact number to complainant Lt Col Avtar Singh Aujla. On 28.11.1997, Lt Col Avtar Singh Aujla noticed that his care was not in the garage and the complaint to that effect was also lodged to the Police at P.S., Delhi Cantt. The complainant Lt Col Avtar Singh Aujla called back the petitioner to assist in the investigations and he expressed his suspicion on Signalman/Driver Ashok Kumar who in the past enquired about that vehicle. His whereabouts were also disclosed by the petitioner and the vehicle was got recovered from the possession of Signalman/Driver Ashok Kumar on 30.11.1997 in Jhunjhunu District of Rajasthan. Signalman/Driver Ashok Kumar gave his confessional

statement and also implicated the petitioner stating that the said vehicle was sold by the petitioner to him for consideration of Rs.50,000/-. Out of which Rs.30,000/- were paid by him and the rest of the amount was assured to be paid after some time. On the basis of the statement of Signalman/Driver Ashok Kumar, the petitioner was also charged by the SCM on 31.08.2000 for the offence under section 379 IPC read with Section 52(a) of Army Act. However, from the side of Union of India, it is submitted that the Confessional statement so made by Signalman/Driver Ashok Kumar further finds corroboration with plea of guilt from the side of petitioner and that was sufficient to hold the petitioner guilty for the offence. Suffice is to mention that the culpability of the petitioner was fixed on the so called confessional statement recorded by the Police. Such confession that too was made before the Police has no legal sanctity and could not be had in evidence. Moreover such confession of co-accused cannot be the sole basis of conviction as was held by the Apex Court in the case of *Sidharth & Others Vs. State of Bihar, 2006 (1) SCC (Cr.Pg.175)*. It shall also be noteworthy that the question as to the burden of proof has been discharged by a party to the lis or not would depend upon the facts of each case. There are not sufficient materials and evidence on record so as to enable the court to arrive at definite conclusion. Under such circumstances, the prosecution on whom the burden of proof lay would still be liable to produce evidence. This is not

such a case where on the pointing out of petitioner under section 27 of the Indian Evidence Act, vehicle was recovered. Merely so called inculpatory statement of Signalman/Driver Ashok Kumar cannot be said to be sufficient. Apart from it, there is no joint trial of Signalman/Driver Ashok Kumar with petitioner. Signalman/Driver Ashok Kumar thereafter absconded and no opportunity was given to the petitioner to cross examine Signalman/Driver Ashok Kumar. Further there is no evidence with regard to the receipt of Rs.30,000/- by the petitioner from Signalman/Driver Ashok Kumar as a part of the consideration of that vehicle.

4. Further the complainant who is the material witness was required to appear to substantiate his version, was withheld by the prosecution without any reason. He was the person who could give the best evidence. The non production of the evidence has certainly prejudiced the fair trial of the appellant. Reliance may be placed in the case of *S.Harnam Singh Vs. State (Delhi Administration)* AIR 1976 SC 2140. He at one point of time made a request for withdrawal of the FIR and for transfer of the criminal case to Army HQ. The withdrawal of the FIR or to transfer the case to the Court Martial both have the different consequences. However, the facts remains that the petitioner was tried by

the Court Martial. Without recording the statement of any of the witness the petitioner was held guilty. Such plea of guilt alone is not sufficient unless there is evidence worth credence to fix the culpability of the petitioner.

**5.** For the reasons assigned above, this case is barren of substance and evidence. The conviction of the petitioner is therefore, not sustainable. **Appeal is allowed. The petitioner shall be deemed to have discharged from service on the date when he was dismissed and would be entitled for pensionary benefits.**

**M.L.NAIDU**  
**(Member)**

**S.S.KULSHRESHTA**  
**(Member)**

**PRONOUNCED IN OPEN COURT**  
**ON 5<sup>th</sup> FEBRUARY, 2010**